FILE COPY

FILED
APR 16 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 861

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

EDWARD H. S. MARTIN,
10 S. LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

INDEX.

SUBJECT INDEX.

	PAGE
Opinion of court below	1
Jurisdiction	1
Statement of the case	2
Specification of error	3
Argument	4
Vested right exists	4
Reserved powers do not authorize destruction of all contract rights	4
Economy Act confiscates insurance and does not merely withdraw consent to suit	5
White v. U. S., distinguished	5
War risk insurance a contract, not a pension	6
Economy Act violates 5th Amendment	7
Emergency does not nullify 5th Amendment	11
Legal Tender Cases not controlling	17
Economy Act merely gives veterans' money to others	18
Economy Act cannot stand as mere withdrawal of consent to suit	20
Repudiation disgraceful	20
Statute of limitations not available as defense	22
Unconstitutional delegation of legislative powers	23
Petitioner's right to question such delegation	23
Economy Act preserves no administrative remedy on war risk insurance	5, 25

PAGE

Congress may not grant unlimited discretion, nor delegate legislative powers 26

Such delegation appears in Economy Act 27

Combination of legislative and executive powers in some person despotic and destructive of free government 28

Also puts too great a burden on one man 36

Unconstitutional character of trend of recent legislation 41

Conclusion 43

Appendix 45

Economy Act, various sections 45

World War Veterans' Act 47

Veterans' Regulations 48

TABLE OF CASES CITED.

Block v. Hirsh, 256 U. S. 135 15

Brooks-S. Corp. v. U. S., 265 U. S. 106 8

Buttfield v. Stranahan, 192 U. S. 470 27

Butts v. Mer. T. Co., 230 U. S. 126 ..... 21, 25

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226 20

Cincinnati v. L. & N. R. Co., 223 U. S. 390 8

Civil Rights Cases, 109 U. S. 3 15

Close v. Glenwood Cemetery, 107 U. S. 466 5

C., M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491 4

Collins v. San. Dist., 270 Ill. 108 23

Coombes v. Getz, 285 U. S. 434 5

Dorchy v. Kansas, 264 U. S. 286 ..... 20, 24

Employers' Liab. Cases, 270 U. S. 463 ..... 20, 25

	PAGE
Ex parte Milligan, 4 Wall. 2	12, 14
Field v. Clark, 143 U. S. 649	27
Fletcher v. Peck, 10 U. S. 87	11
Gardner v. Newburgh, 2 Johns. Ch. 162	20
Harris v. U. S., 5 F. Supp. 368	23
Hepburn v. Griswold, 75 U. S. 603	17
Highland v. Russell C. Co., 279 U. S. 253	11
Holyoke Co. v. Lyman, 82 U. S. 500	5
Home B. & L. Assn. v. Blaisdell, 290 U. S. 398	11
House v. Mayes, 219 U. S. 270	15
Hurtado v. California, 110 U. S. 516	11
I. C. C. v. Goodrich T. Co., 224 U. S. 194	27
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149	26
Legal Tender Cases, 79 U. S. 457	17, 18, 22
Liggett v. U. S., 274 U. S. 215	8
Lloyd v. Sup. L. K. P., 98 F. 66	5
Louisville B. Co. v. U. S., 242 U. S. 409	27
Lynch v. U. S., 67 F. (2d) 490	23
Miller v. State, 82 U. S. 478	5
Monongahela N. Co. v. U. S., 148 U. S. 312	10
Newhall v. Sup. C. A. L. of H., 181 Mass. 111	5
O'Donoghue v. U. S., 289 U. S. 516	31
O'Neill v. Sup. C. A. L. of H., 70 N. J. L. 410	5
People v. McBride, 234 Ill. 146	21, 25
Phelps v. U. S., 274 U. S. 341	11
Pumpelly v. Green Bay Co., 13 Wall. 166	7, 8, 18
Russian V. Fleet v. U. S., 282 U. S. 41	8
Sage v. Baldwin, 55 F. (2d) 968	21, 25
Shields v. Ohio, 95 U. S. 319	5

PAGE

Sinking Fund Cases, 99 U. S. 700 4
Sinnickson v. Johnson, 17 N.J.L. 129 20
Slaughter House Cases, 16 Wall. 36 15
So. Ry. Co. v. Con. F. Co., 203 Ky. 441 11
Stanislaus County v. San. J. & K. R. C. & I. Co., 192 U. S. 201 5
State v. Cumberland Club, 136 Tenn. 84 ..... 21, 25
Stearns v. Minnesota, 179 U. S. 223 5
T., P. & W. Ry. Co. v. McClannon, 41 Ill. 238 23
Trade-Mark Cases, 100 U. S. 82 24
U. S. v. Chi. etc. R. Co., 282 U. S. 311 ..... 9, 27
U. S. v. Cohen G. Co., 255 U. S. 81 ..... 12, 26
U. S. v. Cress, 243 U. S. 316 ..... 9, 18
U. S. v. Dewitt, 9 Wall. 41 15
U. S. v. Lynah, 185 U. S. 445 ..... 8, 18
U. S. v. Shreveport G. & E. Co., 287 U. S. 77 27
U. S. v. Welch, 217 U. S. 333 8
Utah P. & L. Co. v. Pfort, 286 U. S. 165 ..... 21, 25
Wall v. C. & O. R. Co., 200 Ill. 66 22
White v. U. S., 270 U. S. 175 ..... 4, 5, 6
Wilner v. U. S., 68 F. (2d) 442 1
Wilson v. New, 243 U. S. 332 12

TABLE OF STATUTES AND TEXTBOOKS CITED.

Am. Bar Assn. Jour. v. 19, No. 9, Sept., 1933, p. 493 ..... 15, 16
Am. Bar Assn. Jour. v. 19, No. 10, Oct., 1933, p. 587 33
Beck, Future of the Constitution, 19 Am. Bar. Assn. Jour. 493 ..... 15, 16
Economy Act, various sections 2, 4, 5, 7, 23, 25, 27, 37, 40, 45

PAGE

Farewell Address, 12 Writings of Washington 226 31

Federalist, No. 44, p. 351, No. 47, p. 373, No. 48, p. 385 ..... 32, 33, 42

Flander's Life and Times of the Chief Justices, v. 1, p. 256 27

Jay, John, 5 Journals of Cong. 351 21

Jefferson, Notes on the State of Virginia, 195, The Federalist No. 48, p. 385 33

Journals of Cong., v. 5, p. 351 22

Judicial Code, Sec. 240 (a) 1

Madison, James, The Federalist, No. 44, p. 351, No. 47, p. 373 ..... 32, 42

McCarran, Growth of Federal Executive Power, 19 Am. Bar Assn. Jour., No. 10, Oct., 1933, p. 587 33

Veterans Regulation 38, 39, 48

War Risk Ins. Act, Sec. 401 39

Washington's Farewell Address, 12 Writings of Washington 226 31

Webster, Daniel, Writings and Speeches of, v. 2, p. 107, v. 14, p. 362 ..... 30, 31

World War Veterans' Act 2, 47

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 861.

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 68 F. (2d) 442.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 12, 1934. The jurisdiction of the court is invoked under Sec. 240(a), of the Judicial Code as amended, c. 229, 43 Stat. 938, 28 U.S.C.A., Sec. 347. Certiorari was granted April 9, 1934, upon a petition filed March 14, 1934.

Statement of the Case.

Petitioner sued April 28, 1933, in the District Court under the World War Veterans' Act, 1924, as amended (c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U.S.C.A.) to recover total permanent disability and death benefits under the war risk insurance contract of his brother, said intestate (R 2). His verified petition contains the usual allegations of residence of himself and his intestate, enlistment, discharge, making of the insurance contract and payment of premiums. The date of death alleged is May 15, 1929, and letters of administration May 20, 1929. Petitioner, in his individual capacity, is alleged to have been the beneficiary named in the insurance contract. It is alleged that while said insurance was in force decedent became totally and permanently disabled April 15, 1919 (changed by amendment from "to-wit: August 4, 1918"); that due proof thereof and written demand for payment of said insurance was made to appellee, by decedent, November 15, 1928, and by petitioner of that and said death also, May 17, 1929, followed by written denial April 7, 1933, by the Administrator of Veterans' Affairs on the purported authority of Section 17, Title I, of An Act to Maintain the Credit of the United States Government, Public No. 2, 73rd Congress, approved March 20, 1933, hereinafter called the Economy Act, c. 3, Tit. I, Sec. 17, 48 Stat. 11, Sec. 717, Ch. 12, Tit. 38, Pocket Supp., U.S.C.A. The petition then alleges that said Act, especially the portion purporting to affect petitioner's claim, is unconstitutional and void as an attempted delegation to an executive official of legislative powers contrary to Section 1, Article I, of the United States constitution and also as a deprivation of petitioner's property without due process of law and a taking of his private property for public use without just compensation, all

ontrary to the portions of the Fifth Amendment to said onstitution providing that no person shall be deprived of roperty without due process of law, nor shall private roperty be taken for public use without just compensa-ion. Respondent's general demurrer (R 7) to said peti-ion was sustained and the petition thereupon dismissed for want of jurisdiction (R 13). There was a written opin-ion by the District Court (R 8).

On petitioner's appeal the judgment was reversed (R 26), because of the error in awarding judgment for costs against petitioner, and the cause was remanded with directions to dismiss the petition for want of jurisdiction, without costs, the opinion of the reviewing court (R 21), 68 F. (2d) 442, holding that the claimed constitutional violations did not exist.

Specification of Error.

The United States Circuit Court of Appeals for the Seventh Circuit erred in directing the District Court to enter judgment dismissing the petition.

ARGUMENT.

I.

Vested Right Exists.

It seems to be conceded by the Court of Appeals in the instant case, that if petitioner had a vested right to the insurance sued for, the portion of the Economy Act complained of would be unconstitutional, as a taking of private property for public use without just compensation and without due process of law, but that court has attempted to avoid that result by denying any such vested right, on the theory that the reserved powers in the contract of insurance making it subject to subsequently adopted amendments and regulations gave the right to destroy the contract even after it had matured, and on the theory that *White* v. *U. S.*, 270 U. S. 175, denies any vested right in such contracts.

However, all such reserved powers, even those of revocation or appeal, are held to give the right to change or regulate the rights of the parties only in minor and incidental matters in recognition of the continued existence of the contract and do not afford any authority whatever to annul the contract, or repudiate it, or to destroy all rights contracted to be given thereby; and this is true with respect to such reserved powers as to all contracts, whether they be contained in a grant of a corporate charter,

Sinking-Fund Cases, 99 U. S. 700, 720, 721.
C., M. & St. P. R. Co. v. *Wisconsin*, 238 U. S. 491, 496, 501-2.

Coombes v. Getz, 285 U. S. 434, 441-2, 448.
Stanislaus County v. *San J. & K. R. C. & I. Co.*, 192 U. S. 201, 213.
Close v. *Glenwood Cem.*, 107 U. S. 466, 476.
Stearns v. *Minnesota*, 179 U. S. 223, 259.
Shields v. *Ohio*, 95 U. S. 319, 324-5.
Holyoke Co. v. *Lyman*, 82 U. S. 500, 522.
Miller v. *State*, 82 U. S. 478, 498.

or in private contracts of insurance,

Newhall v. *Sup. C. A. L. of H.*, 181 Mass. 111, 116-7; 63 N. E. 1 (Holmes, J.).
O'Neill v. *Sup. C. A. L. of H.*, 70 N. J. L. 410, 420-1; 57 A. 463, 467.
Lloyd v. *Sup. L. K. P.*, 98 F. 66, 70 (C.C.A. 7).

In the instant case the enactment in question does not, as the Court of Appeals supposes, merely withdraw consent to be sued on yearly renewable term insurance contracts and leave the liability of the United States on such contracts to be determined by an administrative official, but seizes the obligation absolutely and does not leave the determination of rights thereunder to anybody whatsoever. Neither the President nor the Administrator of Veterans' Affairs is given any right whatever to allow claims for yearly renewable term insurance and they could not, under the provisions of the Economy Act, allow petitioner's claim even if they desired to do so. The power given by Section 5 of that Act to allow claims, refers to other kinds of claims altogether, those created by Section 1 and regulated by Sections 2 to 4 of said Title I, and not those destroyed by Section 17, and it is with respect to such other claims that the decision of the Administrator of Veterans' Affairs is made final without any right of review by the courts.

The Court of Appeals is also mistaken in assuming that *White* v. *U. S.*, 270 U. S. 175, supports the contention that

by virtue of the reserved powers, or otherwise, there is no vested right in a war risk insurance contract. In that case the soldier had changed the designation of beneficiary to his aunt, who was not in the eligible class. After a few months' payment of death benefits to the former beneficiary, Congress enlarged the class of permitted beneficiaries to include an aunt and made the amendment retroactive. This was held to apply to the existing contract in spite of the supposed rights of the former beneficiary, but that beneficiary had not been a party to the contract and the soldier had not wanted that beneficiary to receive any of the insurance but had wanted it to go to his aunt, and it was held the government could waive the limitation made for its benefit and give effect to the wish of the soldier to have the aunt become beneficiary. The government did not claim it could destroy the contract or take it to itself altogether, but argued that the change was to make the wish of the insured effective and was valid as a curative act. Even if it were true that a beneficiary has no vested right, the instant case involves not only the right of a beneficiary to death benefits, but also the right of the insured soldier himself to total permanent disability benefits which matured during his lifetime and which are sued for by his administrator in the right of the insured and not as beneficiary.

The fanciful theory that there was no contract, but war risk insurance was a mere pension, because the government wrote war risk insurance at lower rates than private companies, is without authoritative support. In fact, *White* v. *U. S.*, 270 U. S. 175, expressly decides that war risk insurance is a contract. When the insurance was offered it could not be known whether the premium rate was less or more than cost. If the war had ended earlier, or if our armed forces had not been sent to Europe, but had been kept at home or on the seas only, it is likely the insurance business would have made the government a profit.

Even if the government had written the insurance at less than cost and had received no commensurate benefit for the excess cost which it carried, the relation would, nevertheless, be one of contract. The time has not yet come when any insurer, private or governmental, will be heard to say that it should be relieved of its obligations because, either through error of judgment or deliberately, it contracted for too low a premium. However, in insuring at a premium rate below the cost of war time insurance, the government did not give something for nothing. It was entirely the other way around. The excess cost which the government assumed, was, in exactly the same degree as the $30 to $36 per month which it paid to its soldiers in cash, their wages for the arduous and dangerous work which they did in fighting for their country and risking, and in many cases surrendering, their health and their lives, and it ill comports with even the slightest considerations of decency to say that they were overpaid.

II.

Violation of the Fifth Amendment.

The Act in question violates the Fifth Amendment by abolishing, without compensation, petitioner's war risk insurance, which had matured by total permanent disability and death long before the enactment of the Act. The very title of the Act shows the taking to be for public use, namely, "to maintain the credit of the United States Government." It matters not that the taking is by destruction, for that is a taking within the meaning of the Fifth Amendment. It was so held in deciding that a land owner had a constitutional right to compensation for his land because its value was destroyed by overflow caused by public works built on other land.

Pumpelly v. *Green Bay Co.*, 13 Wall. (60 U. S.) 166, 177-8.

The right to compensation exists regardless of the manner of taking and without any formal eminent domain proceeding or suit.

U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.

If it be contended that there was no taking of petitioner's property, but merely an indirect and consequential damage, the case does not differ in principle from those in which the same argument was overruled with respect to damage to land by overflow caused by dams built on other land, or caused by destruction of a right of way on other land.

Pumpelly v. *Green Bay Co.,* 13 Wall. (60 U. S.) 166, 177-8.
U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.
U. S. v. *Welch,* 217 U. S. 333, 338-9.

The protection of the Fifth Amendment is not confined to real estate, but extends to the taking of contract rights, and is as broad as the right of eminent domain itself.

Russian V. Fleet v. *U. S.,* 481, 486, 489.
Brooks-S. Corp. v. *U. S.,* 265 U. S. 106, 123.

> "This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of a contract, are, along with land and movables, within the sweep of this sovereign authority. * * * Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use."
>
> *Cincinnati* v. *L. & N. R. Co.,* 223 U. S. 390, 400.

It also extends to other personal property.

Liggett v. *U. S.,* 274 U. S. 215, 218, 220.

The prohibitions in the Fifth Amendment against taking property without just compensation or without due process of law are limitations upon the powers granted to the federal government either specifically, or in general terms, or by implication, in other portions of the constitution.

> "The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation."
>
> *U. S.* v. *Chi., etc. R. Co.*, 282 U. S. 311, 327-8.

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."
>
> *U. S.* v. *Cress*, 243 U. S. 316, 319-20, 326.

The foregoing was a case which held there was a taking for public use where a dam lower on a river backed up the water to the plaintiff's mill so it could not be used part of the time and destroyed only one-half of the value of the property.

> "in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. * * * 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government."

Monongahela N. Co. v. *U. S.*, 148 U. S. 312, 325.

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

'It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited

dominion of others, whether it is not wiser that this power should be exercised by one man than by many.'"

Hurtado v. *California*, 110 U. S. 516, 535-7.

Perhaps the constitutional provision in question is a mere declaration of the inherent right of a free people which would even exist without it and is incapable of being taken away.

> "It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

Fletcher v. *Peck*, 10 U. S. 87, 135.

Instances of the application of the constitutional prohibition in question to acts adopted to meet a public emergency are

So. Ry. Co. v. *Con. F. Co.*, 203 Ky. 441, 442-5; 262 S. W. 581.

Highland v. *Russel C. Co.*, 279 U. S. 253, 258, 259-60.

Phelps v. *U. S.*, 274 U. S. 341, 343, 344.

The emergency resulting from economic conditions, whether greater or less than war emergency, cannot suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth Amendment, any more than so grave an emergency as a state of war can do so.

Home B. & L. Assn. v. *Blaisdell*, 290 U. S. 398, 425.

In declaring Section 4 of the Lever Act void, it was said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments * * *. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."
>
> *U. S.* v. *Cohen G. Co.*, 255 U. S. 81, 88-9.

The idea that *Wilson* v. *New*, 243 U. S. 332, holds that the constitution may be disregarded in an emergency, is altogether unfounded. The question in that case was whether the Act then under discussion was valid under the commerce clause or void as a deprivation of property without due process of law. The court divided five to four on the question of constitutionality because of divergent views as to the existence of the power, but decided unanimously that emergency can never create a power or authorize a disregard of the constitution, as may be seen from the majority opinion (p. 348) and the following quotations from the dissenting (concurring on this point) opinion (pp. 370-2):

> "If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. The argument of justification by emergency was made and answered in this court in *Ex parte Milligan*, 4 Wall. 2. * * * Speaking of the purposes which controlled in the adoption of the Federal Constitution and animated those who framed that instrument this court said, p. 120: 'Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and deci-

sive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.' * * *

"This principle is equally applicable today. Constitutional protection is more essential in times of unrest and agitation than it would be in the security of less turbulent periods. The Constitution intended to protect the citizen against encroachments upon his rights impelled by existing emergencies, or supposed necessity of prompt and vigorous action. Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution.

"I agree that a situation, such as was presented to Congress at this time, properly called for the exertion of its proper authority to avert impending calamity. I cannot agree that constitutional rights may be sacrificed because of public necessity, nor taken away because of emergencies which might result in disaster or inconvenience to public or private interests. If this be not so, the constitutional limitations for the protection of life, liberty, and property, are of little value, and may be taken away whenever it is supposed that the public interests will be promoted by the sacri-

fice of rights which the framers of the Constitution intended should be forever protected from government invasion by any branch of the government."

(p. 376-7) "It amounts to no more than saying that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government. *Ex parte Milligan*, 4 Wall. 2."

The emergency that was under discussion was thus stated in the majority opinion (p. 342):

"The President, stating his efforts to relieve the situation and pointing out that no resources at law were at his disposal for compulsory arbitration to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress * * * ."

Ex parte Milligan, 4 Wall. 2, 120, 125, 126, in addition to what is quoted in the case just mentioned, also has the following to say, which is pertinent to the instant controversy:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years sought to be avoided * * *

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the damages to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew— the history of the world told

them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the *writ of habeas corpus.*"

"But, it is insisted that the safety of the country in time of war demands that this provision for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

Block v. *Hirsh*, 256 U. S. 135, was another five to four decision. The majority opinion upheld the Act on the ground of emergency as expressed in the Act itself, but this was an exercise of the police power which Congress has over the District of Columbia and the Territories and not otherwise. (*House* v. *Mayes*, 219 U. S. 270, 281-2; *Civil Rights Cases*, 109 U. S. 3, 19; *Slaughter House Cases*, 16 Wall. 36, 63-4; *U. S.* v. *Dewitt*, 9 Wall. 41, 45.) Of course, public welfare and necessity are the very things which give operative effect to the police power. Except as applied to police power, we believe the majority would have agreed with the very forceful comments in the dissenting opinion, which are too long to quote (pp. 160, 162-6, 168-9).

In a speech by James M. Beck, before the Bar Assn. of Tennessee, 19 Amer. Bar Ass'n Jour. No. 9 (Sept. 1933) 493, 495, it is said:

"that in many cases, as, for example, the emergency measures of the present Congress, the law will be en-

> forced long before a case could reach the Supreme Court, and when the controversy is thus presented to that Court as a *fait accompli*, that the Court will find a way, if at all possible, to accept the legislation, on the theory that it, not being omnipotent, cannot unscramble eggs that have once been scrambled." * * *

That idea is one often heard, but we do not agree with it. We think the Court will demonstrate that while eggs cannot be unscrambled, yet, to still speak in culinary terms, garbage can be thrown out before, by its putrefaction, it destroys the whole national edifice and brings sickness and destruction to all the dwellers therein.

Further remarks by Mr. Beck in that same speech, (pp. 498, 540) flash a warning which ought to be heeded. They are as follows:

> "Of all constitutional heresies, the worst, as it seems to me, is the theory that in case of an emergency the Constitution is non-existent for the time being. This doctrine has been the wooden horse, under cover of which the citadel of the Constitution has been taken, for of the Constitution it can now be said: *'Illium fuit.'* * * *.
>
> "The people live in the day, forgetful of yesterday, and indifferent to the morrow. With such a spirit, no constitution can possibly survive. * * *
>
> "We must not let this elemental storm blind our vision. Let us hope and pray—however dark the present prospect is—that the Constitution of the fathers, when this storm of economic disaster has passed away, may again be seen standing as before, upon its foundations of eternal granite, liberty and justice. With me, as the shadows of life lengthen, this hope is only a pious wish—not a conviction. It is only a hope and not a conviction because I can see no evidence that the American people are now influenced by the spirit of constitutional morality, without which no written constitution can possibly endure. * * *

"The present generation of Americans are such invincible pragmatics that they are only concerned with the immediate advantages of a given policy and not with the questions of fundamental and permanent importance. They follow gladly any policy that promises an immediate advantage. * * *

"Let a dulcet flute sound the notes of renewed prosperity and all classes follow as little children, unconscious of the fact that in seeking temporary advantage, they are destroying the fundamental principles of the noblest government that has yet been devised by the wit of man.

"All we can do is to hope and pray that there will some day come a rebirth of the old spirit of ordered liberty, for unless it comes, not only will the Constitution perish in everything except in form, but the Union itself may not survive the destruction of its fundamental law. * * *"

We cannot agree with Mr. Beck in his gloomy outlook for the future. His fears would be well grounded except for one thing. The Supreme Court is a forceful living thing, designed to guard the constitution, and through it the country, from the evils feared, in spite of indifference or delusion of the people and congressional and executive disregard of duty.

The *Legal Tender Cases* do not establish the validity of the enactment now under attack because they do not apply to the facts, and, even were it otherwise, should be disregarded because of the peculiar circumstances under which they were decided. Regardless of everything that has been said about that decision, we still have nothing except a five to four decision in *Legal Tender Cases,* 79 U. S. 457, purporting to repudiate the principles of law established by a five to three decision in *Hepburn* v. *Griswold,* 75 U. S. 603. If a five to four majority was not bound by a former five to three decision, then the Supreme Court now would

not be bound by the five to four decision. Especially would this be so if the five to four decision proves upon examination to have been based upon principles of law which have since been abandoned and repudiated,—and that is just what has occurred. The majority decision in the *Legal Tender Cases* was obviously based upon arguments and reasons of expediency. In that situation, it is not strange that some of the legal principles announced by the majority have since been abandoned. Such an abandoned principle is that the inhibition of the Fifth Amendment in question here applies only to a direct taking and not to consequential injuries resulting from the exercise of lawful power. (*Legal Tender Cases,* 79 U. S. 457, 551). This theory has been abandoned in later cases holding that where the value of a man's land, or a substantial portion of such value, is destroyed by the backing up of water caused by the lawful erection of a dam under government authority on the lands of another, the man whose lands are overflowed or interfered with, although there is no seizure of possession or change of title, but only a consequential and indirect destruction or impairment of value by a lawful act of the government, may recover just compensation under the Fifth Amendment to the same extent as though there had been a direct taking.

U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.
U. S. v. *Cress,* 243 U. S. 316, 319-20, 326.
Pumpelly v. Green Bay Co., 13 Wall. (80 U. S.) 166, 177-8.

Even if we take notice that the true purpose of the Act complained of was to take money from ex-soldiers and their dependents in order to help pay the wages of numerous unemployed individuals who would be given jobs on extensive tree-planting or other public projects, thus lessening unemployment and seeking by reckless and wasteful

public expenditures upon various visionary or useless undertakings to lift the country out of the depression into which it had been plunged by previous reckless and wasteful public expenditures, we have but a case of taking money from one man to give it to another, and the taking of private property for private use without just compensation is just as much a violation of the constitution and of natural right as a similar taking for public use. In a case where a judgment in a condemnation proceeding awarding $1 found by a jury to be the value of the property taken, was held violative of the Fifth Amendment, it was said:

> "The requirement that the property taken shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' * * * The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. * * * The mere form of the proceeding instituted against the owner, * * * cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. * * * No court, he said, would hesitate to adjudge void any statute declaring that 'the homestead now owned by A should no longer be his, but should henceforth be the property of B.' In accordance with these principles it was held, in that case, that the property of the citizen could not be taken, under the power of taxation to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public one. * * *

> In the early case of *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson* v. *Johnson*, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; * * * and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution.'"
>
> *C., B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236-8.

It is unnecessary to deny that Congress could withdraw the consent of the United States to be sued on war risk insurance contracts by an act devoted to the single purpose of such withdrawal, although even in that event some other method of ascertaining and performing such obligations of the United States would probably have to be provided. Congress did not merely withdraw consent to suit, but that withdrawal is a mere incident, by implication alone, to a seizure and confiscation of the contract obligations of the United States in order to maintain its financial credit, regardless of how reprehensible such a course may be, or how destructive of its honor and moral credit, and it is not to be presumed that Congress would have enacted a withdrawal of consent to suit, if it had known the remainder of the Act was void. Without such presumption a part only of the Act cannot be sustained, as will be shown in part III of this argument.

Dorchy v. *Kansas*, 264 U. S. 286, 289-90, 291.
Employers' Liab. Cases, 207 U. S. 463, 501-2.

Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
Sage v. *Baldwin*, 55 F. (2d) 968, 970.
The People v. *McBride*, 234 Ill. 146, 165-6; 84 N. E. 865.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

It must be that on the impulse of the moment Congress and the President, without realizing fully the effect of the Act in question on the insurance contracts of the United States with its ex-soldiers, have been induced to enact something which, if allowed to stand, will hold the nation up to shame before all the world as one whose most solemn and sacred pledges mean nothing and which is utterly faithless to its most sacred obligations. To save the nation from the justly merited contempt of all men and nations, there now remains nothing but the power of the Court to declare this vicious enactment void. This is very plain speaking, but it is a situation that calls for plain speaking, and the statements herein as to the dishonor and disgrace to the nation in allowing the Act complained of to stand, are mild in comparison with comments made by prominent men with respect to the mere suggestion that the United States might repudiate certain other obligations of less sanctity than those to ex-soldiers who have risked their lives and health in their country's service. Note the following by John Jay, President of Congress and later Chief Justice of the Supreme Court:

> "The pride of America revolts from the idea; her citizens know for what purposes these emissions were made, and have repeatedly plighted their faith for the redemption of them; they are to be found in every man's possession, and every man is interested in their being redeemed; they must, therefore, entertain a high opinion of American credulity who suppose the

people capable of believing, on due reflection, that all America will, against the faith, the honor, and the interest of all America, be ever prevailed upon to countenance, support, or permit so ruinous, so disgraceful a measure. We are convinced that the efforts and arts of our enemies will not be wanting to draw us into this humiliating and contemptible situation. Impelled by malice and the suggestions of chagrin and disappointment at not being able to bend our necks to the yoke, they will endeavor to force or seduce us to commit this unpardonable sin in order to subject us to the punishment due to it, and that we may thenceforth be a reproach and a byword among the nations. Apprised of these consequences, knowing the value of national character, and impressed with a due sense of the immutable laws of justice and honor, it is impossible that America should think without horror of such an execrable deed."

5 Journals of Congress 351 (See 1 Flander's Lives and Times of the Chief Justices 256).

"I am not willing to admit that the Constitution, the boast and glory of our country, would sanction or permit any such legislation. Repudiation in any form, or to any extent, would be dishonor, and for the commission of this public crime no warrant, in my judgment, can ever be found in that instrument."

Legal Tender Cases, 79 U. S. 457, 674 (Field, J., dissenting).

The theory of the District Court, not adopted by the Court of Appeals, that the statute of limitations justifies the sustaining of the demurrer, is unsound, because in an action at law the defense of limitations can be availed of by plea only, not by demurrer.

Wall v. *C. & O. R. Co.*, 200 Ill. 66, 67-8; 65 N. E. 632.

Even were it otherwise, the amended date of beginning of total permanent disability, as shown by the opinion of

the Court of Appeals (R 22), was within the ten-year limitation period. Even under the petition before amendment such date was alleged under a videlicet and the petition shows that the premiums were paid out of decedent's pay as a soldier until his discharge from the army, March 31, 1919, which kept his insurance in force to May 1, 1919, and the allegation of the disability date under a videlicet was sufficient as an allegation of any date within the statute of limitations while the insurance was in force and therefore on the face of the petition the statute had not run.

Collins v. *San. Dist.*, 270 Ill. 108, 111; 110 N. E. 318.

T., P. & W. Ry. Co. v. *McClannon*, 41 Ill. 238, 240-1.

In this respect the instant case differs from *Lynch* v. *U. S.*, 67 F. (2d) 490, which has been distinguished in somewhat similar manner in a district court case which also holds the enactment now in question unconstitutional as a violation of the Fifth Amendment.

Harris v. *U. S.*, 5 F. Supp. 368.

III.

Unconstitutional Delegation of Legislative Powers.

Title I, of the Economy Act is also void as an unconstitutional delegation of legislative powers to the executive department, contrary to Section 1, Article I, of the constitution. This delegation is found mainly in the pension and compensation features of the Act and other matters not embraced within war risk insurance, but petitioner has a right to raise the constitutional question because he is adversely affected by a portion of the Act and it cannot be sustained in part, for it cannot be certain that Congress

would have enacted the portion affecting petitioner if it had known that the other portions were void, and a mere possibility or doubt will not be sufficient to uphold it in part, as the court cannot exercise the legislative powers and discretion of Congress. In such case the burden is on those seeking to uphold the remaining portion to show it would have been enacted alone.

In a statute where Section 28 provided that if any portion of the act should be held void, the remaining portions should be held valid, it was said:

> "But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the Act and held bad should fall. * * * Section 28 of the Act, * * * provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command. * * * So far as appears, the state court has not passed upon the question whether Section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment * * * should be vacated."
>
> *Dorchy* v. *Kansas*, 264 U. S. 286, 289-90, 291.

> "even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. * * * As the Act * * * relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, * * * we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the *Trade-Mark Cases*, 100 U. S. 82, where an Act of Congress concern-

ing trade marks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said: (p. 99) 'If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade mark law which is only partial in its operation'."

Employer's Liab. Cases, 207 U. S. 463, 501-2.

"In the absence of a legislative declaration the legal presumption is that an act is to be effective in its entirety, since there is no right of mutilation and a court will not resort to elimination."

Sage v. *Baldwin*, 55 F. (2d) 968, 970.

To the same effect are

Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
The People v. *McBride*, 234 Ill. 146, 165-6.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

The Act in question shows a comprehensive scheme to cut down payments to veterans of all wars subsequent to the Civil War by way of pension, disability compensation, disability allowance, medical and hospital treatment and domiciliary care and the portion with respect to insurance seems to be thrown in merely as an incident to the general plan and to make insurance beneficiaries suffer a loss, as well as veterans theretofore entitled to other benefits, and it is not to be presumed that Congress would have enacted the portion concerning insurance independently of the other portion.

The Court of Appeals errs in supposing that the Economy Act delegates to anybody the right to pass upon war risk insurance claims that had not been allowed or dis-

allowed prior to March 20, 1933, for such right is entirely abolished by that Act, although the Court of Appeals is right in deciding that the duty of passing upon claims against the United States may be delegated to administrative bodies or officials. This is so because such functions are fact-finding ones, not involving the exercise of discretion. The allowance of pensions may be delegated, just as other discretionary powers may be given to an official of the executive department in the administration of other laws enacted by Congress, but in such cases the primary standards for such allowances or the exercise of such discretionary powers must be fixed by Congress and not left to the unguided discretion of the officials in question.

It has been held that the Act of Congress enacted during the world war prohibiting the charging of unreasonable prices for various foodstuffs and other commodities was unconstitutional and void because it failed to fix the standard by which the reasonableness could be determined and thus constituted a delegation of legislative authority to the courts and juries who would be called upon to try the cases involving alleged violations of the Act.

U. S. v. *Cohen G. Co.*, 255 U. S. 81, 89-91, 92-3.

> "To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do as they might desire, is false reasoning. * * * Congress cannot transfer its legislative powers to the States—by nature this is non-delegable."
>
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164.

> "That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, de-

volve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."

U. S. v. *Shreveport G. & E. Co.*, 287 U. S. 77, 85.

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Field v. *Clark*, 143 U. S. 649, 692-4.

Other cases illustrative of what is and what is not a fixing of the primary standards, and the necessity of doing so, are

Louisville B. Co. v. U. S., 242 U. S. 409, 424-5.
I. C. C. v. *Goodrich T. Co.*, 224 U. S. 194, 214, 215.
U. S. v. *Chi., etc. R. Co.*, 282 U. S. 311, 324.
Buttfield v. *Stranahan*, 192 U. S. 470, 496.

The objectionable delegation of unlimited discretion in Title I of the Economy Act is to be found in the provisions of Section 1, that certain classes "may" be paid a pension, "subject to such requirements and limitations as shall be contained in regulations to be issued by the President;" of Section 1 (b) that the President may reduce the pension rate "as he may deem proper;" in the fact that no provision requires the allowance of any pension to any class unless the President shall desire to pay it; in the absence of any guide for the discretion of the President in determining the amount of pension within the wide limits of $6 to $275 per month for disability and $12 to $75 per month for death in Section 2; in the provisions of Section 3 authorizing the President to prescribe the "minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension," therefor, without in any way

fixing any rule or principle for designating such minimum and maximum other than the mere whim of the President, and further authorizing the President to prescribe "such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars," but leaving it to his uncontrolled discretion to determine just what shall be just and equitable; in the provisions of Section 4 that the President shall prescribe by regulation the date of beginning and termination of the period in each war, service within which shall be deemed war-time service, in spite of the fact that the wars in question had become history and the facts on that point were as available to Congress as to the President; also in the provisions of Section 4 that the President shall prescribe "by regulation the required number of days of war or peace time service for each class of veterans, the time limit on filing of claims" and "any other requirements as to entitlement as he shall deem equitable and just," thereby leaving it to the President to determine a matter which could have been determined as easily by Congress from facts equally available to both and authorizing the President to enact a statute of limitations. The Section goes on to say that the President "may prescribe different requirements or conditions for the veterans of different wars" and may further subdivide the classes of persons and apply different requirements or conditions to such subdivisions. This, of course, means discrimination between various classes of veterans, not according to any rule fixed by Congress, but according to the whim of the President.

The delegation of legislative powers to the President is not in harmony with the American system of government, and unless we are to abandon the constitutional safeguards and turn our system of government into a social despotism of the nature of that of Soviet Russia or Nazi Germany, a halt upon the current trend of congressional

legislation must be called, and the courts are now the only power which can apply the curb. The argument of the President in seeking these powers of a dictator was that an emergency existed which required it,—an argument which has later given way to the announcement that many of them are to be permanent. However, the emergency could not be greater than that existing in war time and even that will not justify setting aside the constitution. Even if the purpose and intentions of the President are good ones, those of persons under whose influence he acts may be otherwise, or this vast power might be abused by another President whose purposes and intentions might be the reverse, or a President might fail mentally and do untold damage by the exercise of dictatorial powers before his condition could be sufficiently recognized and before steps could be taken to safeguard the country, and in any event the acts of a legislative body such as Congress would be more deliberate and less likely to be swayed by hysteria, than the acts of any one man. The granting of despotic powers for the accomplishment of a desirable end is the very means by which free governments are usually destroyed.

The idea expressed in respondent's brief in the Court of Appeals that those who framed the Constitution were not afraid of the concentration of power in the executive, is altogether fallacious. True, at that time the President did not have control of the vast amount of patronage at the disposal of modern presidents and for that reason the danger of seizure and exercise by the President of despotic and unconstitutional powers was not so great as at the present day and in early times the greatest danger of usurpation was in Congress, yet the makers of the Constitution had enough foresight to guard against the centering of despotic power and unbridled discretion in any branch of the government, and the means adopted to guard

against this was the constitutional separation of the powers of the three branches of the government. A few quotations will exemplify this:

"But, in my opinion, a yet greater danger threatens the Constitution and the government; and that is from the attempt to extend the power of the executive at the expense of all the other branches of the government, and of the people themselves. Whatever accustomed power is denied to the Constitution, whatever accustomed power is denied to Congress or to the judiciary, none is denied to the executive."

2 Writings and Speeches of Daniel Webster, 107.

"It is important, likewise, that the habits of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any par-

tial or transient benefit which the use can at any time yield."

Farewell Address, 12 Writings of Washington 226.

"The powers of the departments are not all mixed up in a jumble. They are separate, and are made separate by the Constitution; and have hitherto been kept separate by the practice of the Government. I hope they will continue to be kept separate, for then there is a just responsibility. If every department acts within its own power, it takes the responsibility belonging to its power. But if the powers of two or more departments are mixed up irregularly and jumbled together, there is no just responsibility upon anybody."

14 Writings and Speeches of Daniel Webster 362.

O'Donoghue v. *U. S.*, 289 U. S. 516, 530, is perhaps the most recent pronouncement holding void an act of Congress disregarding the constitutional distribution of governmental powers. That opinion, on such point, was unanimous, for the dissent was on another question. The opinion says:

"The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, * * * namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

If it be important thus to separate the several departments of government and restrict them to the ex-

ercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers' * * * And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' "

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

James Madison, The Federalist, No. 47, pp. 373-4.

"All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. * * * As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free prineiples, but in which the powers of government should be so divided and balanced among several

bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."

Thomas Jefferson, Notes on the State of Virginia, 195; quoted by *James Madison, The Federalist,* No. 48, p. 385.

There is daily becoming more and more apparent to the sound and substantial legal minds of the country, the danger to our very existence threatened by the disregard of the constitutional separation of governmental powers and other unconstitutional enactments of the 73rd Congress and the usurpation of powers by the executive in accordance with, and even beyond the scope of, such unconstitutional enactments. For instance, at the annual meeting of the American Bar Association only a few months ago Senator Patrick A. McCarran delivered an address on "The Growth of Federal Executive Power," which the editors of the Association's Journal thought of such importance as to be published in full. It touches upon unconstitutional delegation and usurpation of powers and also upon other questions involved in the mass of recent legislation and ought to be read with interest even without its particular application to the case at bar.

19 Am. Bar Assn. Journal, No. 10, Oct., 1933, p. 587.

Especially pertinent extracts from that address, the first of which refers to Andrew Jackson, are as follows (pp. 589-90):

"In this Administration, we find the Executive exercising monarchial power in the name of the Law; and,

here, we find the first open declaration by the Executive of the assumption on his part of powers and prerogatives, feared and conjectured by Jefferson and sought to be guarded against by Jefferson adherents, by the very language used in the Organic Law itself. * * *

Here we find the office of the newly elected Warrior President treated as if it were a captured fortress. The will of the new Executive became the law, all existing theories were subordinate to that will. * * * He forced laws upon Congress. He took the public purse from the custody of Congress, * * *

The expansion of the Executive, arbitrary and dictatorial as it was under Jackson, was productive of spontaneous expressions not at all out of line with those that have been made, by reason of subsequent acquisitions by the Executive. We find Clay expressing himself thus: 'We are in the midst of a revolution, hitherto bloodless, but rapidly tending toward a total change of the pure, republican character of the government and to the concentration of all power in the hands of one man. The powers of Congress are paralyzed, except when exerted in conformity with his will. * * * In a term of eight years, a little more than equal to that which was required to establish our liberties, the Government will have been transformed into an elective monarchy—the worst of all forms of government.'

In Jackson's dominant attitude, manifesting a total disregard for Constitutional limitations, we find the expansion of the Executive coming into our form of government by leaps and bounds. * * *

But, through all of this and from all of this, there developed the establishment of new and unthought-of kingly powers. And, while the people played and laughed, a new form of Government was being slowly crystallized, a form of Government dictatorial and dominating, threatening the very liberties of those who unmindfully witnessed their formation, and awakening dead voices that struggled through seven

years of Revolutionary turmoil to throw off the yoke of a limited monarchy."

then, coming down to the present (p. 592):

"* * * and we can hearken to the spirit of Jefferson, repeating the words of the great author where he said: 'Were we directed from Washington when to sow and when to reap, we should soon want bread.'

Assuming that these great powers, surrendered by the people into the hands of the Executive, rest today on the shoulders of a friendly, far-sighted, clear-thinking individual, what does that prophesy for the future? When will we have another Jackson, another Johnson?

Moreover, these codes, rules and regulations, and the powers conferred on the Executive by the recent legislation, are not made or enforced by the Executive—such would be a human, physical impossibility. These codes and regulations are made and enforced by individuals never chosen by the people, never confirmed by the Senate of the United States. However zealous their application, however lofty their motives, they are, nevertheless, removed and remote from the Governing Power. * * *

The expansion of the Executive, as it exists today, is not a spontaneous thing. * * * * Unheeding, the majority of the people have gone on through successive steps in this growth, until today the awakening comes, when a new form of Government is found seated on the throne of Democracy.

An unrestricted monarchy once asserted its will in Great Britain. The voice of the people was a wee, small whisper in the wind. Today, that Monarch, though still invested with power, dares not assert it. The veto power, still lodged in the hands of the King, has not been asserted in nearly a century. The doors of the Bastile swung on quiet hinges, but they were battered down with tumult. The people slumber, while processes go on. But, if this giant creature awakens and calls for its former rights, its thundering cries may shake the World.

I firmly believe that the judgment of the people of this country will be exercised before the time comes that, through the expansion of the arbitrary powers in the Executive, brings us to a fall. What we may fear is the revolutionary turn which a liberty-loving people may take, when they realize that their rights and liberties have been shorn from them.

The Road Back may be more destructive than the avenue forward. This is an hour for the revival of faith, the faith of the Fathers. This is an hour for us here assembled, as the representatives of the mass concept of the law, to lend our whole beings, so that our Nation, founded under God, shall go on for Humanity."

What has just been quoted gives rise to serious thought. It is apparent that the legislative branch of our government is almost wholly under the domination of the executive, leaving the judicial branch as the only guardian and protector of the constitutional rights of the people. We believe that the judiciary will be courageous enough and independent enough to vindicate the constitution and to confine the executive department to its constitutional powers before the judicial department also becomes dominated by the expanding powers of the executive.

One man, be his intentions ever so good and his ability ever so great, will never be able, with the little time at his disposal, to investigate and duly consider all phases of the situation involved in such legislation, but must depend on the advice and information furnished by various underlings or volunteers. These will not be the persons to whom the people have entrusted the power to legislate and many of them may be more or less ignorant or actuated by a desire to make the legislation accord with some pet hobby of their own, or with the selfish wishes of those by whom they are controlled or vent their spite on some class of citizens towards whom they are ill-disposed.

The Act now under attack is an illustration of this. It is incredible that, with full cognizance of the facts and opportunity for due deliberation, the President would have brought upon the country the shame and reproach of repudiating its contract obligations to its citizens who have risked their health and lives in fighting for their country upon its battlefields and who have bought with a substantial portion of their meager soldier's pay the contracts now repudiated and have been induced to buy those contracts under the seemingly fair and reasonable assurance that thereby they were securing themselves in case of total permanent disability, and their dependents in case of death, against pauperism and assuring to themselves and their loved ones, funds for support rightfully theirs and not charity. It would seem that the destruction by the Act in question of the insurance rights of these ex-soldiers must have been inserted in the Act as a result of the efforts of some adviser of the President, actuated by a spirit of vindictive hatred against war veterans or a desire to cut down the surtax of his wealthy patrons or friends by shifting the burden of support of war veterans from the national government to smaller taxpayers of the states.

An unworthy mercenary spirit is shown in the Act in question in discriminating between yearly renewable term insurance, which is bringing in no further premiums, and converted insurance, premiums on most of which are a present source of government income. As there is no further income from the former, it is destroyed, but as converted insurance is still in force and there are many ex-soldiers who can still be exploited through payment of premiums under the delusion that their country's solemn promises mean something and will be kept, converted insurance has not yet been touched by the statutory blight.

What has been said about the necessity of the President relying upon underlings who are sometimes ignorant, in-

stead of giving the matter his individual attention, is well illustrated by the executive order known as Veterans Regulation No. 8, issued March 31, 1933, under the Act in question, and published by the Government Printing Office in a pamphlet entitled "Veterans' Administration, Public No. 2, 73rd Congress, and executive orders issued pursuant thereto, governing the granting of benefits to veterans of the armed forces of the United States and their dependents," (pp. 20-1). Surely the President, if personally responsible for this regulation, would have informed himself of the nature of automatic insurance and would not have fallen into the palpable error of confusing automatic insurance with yearly renewable term insurance and treating the former as included in the latter. That error must have resulted from the ignorance of some underling or the vindictive spirit of some adviser seeking to still further injure ex-soldiers and take from some of them something without any shadow of legal authority. Automatic insurance is not mentioned in the Act of March 20, 1933, and has no characteristic of yearly renewable term insurance. Such automatic insurance is neither yearly nor renewable because, by the very terms of the Act creating it, it must have either matured or expired in less than a year. It was intended merely as additional pay for the services of soldiers who, while in military service, became totally and permanently disabled or died, without having applied for war risk insurance within the period, much less than a year, specified in the Act creating it, which is in part, as follows:

> "Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of 120 days after October 15, 1917, or 120 days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied

for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each;"

Sec. 401, *War Risk Insurance Act*. 1919 Supp. Fed. Stat. Ann. 388; 41 Stat. 374.

Notwithstanding this, said Veterans Regulation No. 8, Parts III, IV and V, uses the words "yearly renewable term insurance (including automatic insurance)" and attempts to repudiate, under alleged authority of said Act of March 20, 1933, all of such automatic insurance.

Another illustration of the desire to seize further arbitrary and despotic power under the Act in question, but beyond its limits, is found in executive order Veterans Regulation No. 4, concerning protected awards, published with said Act of March 20, 1933. Section 17 of said Act protects awards, *first*, by providing, after repealing all grants of compensation and other allowances, "but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted," thereby protecting all awards against reduction or cancellation until the end of June, 1933, and *second*, by providing that "the provisions of this title shall not apply to compensation or pension (except as to rates, time of entry into active service and special statutory allowances), being paid to veterans disabled, or dependents of veterans who died, as the result of disease or injury directly connected with active military or naval service (without benefit of statutory or regulatory presumption of service connection) pursuant to the provisions of the laws in effect on the date of the enactment of this Act," thereby creating another class of protected awards. Now, said Veterans Regulation No. 4, in addition to properly providing that the provisions of Title I of the Act shall not be applicable to any claim wherein compensation or pension is being paid based on a finding

heretofore made pursuant to law that the injury or disease causing disability or death was directly connected with active military or naval service, also improperly provides that "the protection afforded by Section 17 is not applicable to any claim wherein the injury or disease causing disability or death has been connected with active military or naval service by virtue of any statutory or regulatory presumption of service connection," thereby arbitrarily and illegally cutting off, prior to July 1, 1933, payments of awards based on a presumption of service connection, which said Section 17 says shall not be cut off prior to the latter date.

These two instances are but illustrations of the fact that when legislative and administrative powers are combined in one individual or body of persons, a despotism is created under which unjust laws will be enacted and will be enforced in an unjust and despotic manner. The Act of March 20, 1933, if allowed to stand, brings to the nation the shame and disgrace of repudiation of its solemn obligations and promises to those as to whom such promises should ever be held sacred, a repudiation of which the least honorable civilized nation in the world would scorn to be guilty. To save the country from such shame and disgrace is one of the very purposes for which the Constitution was adopted and for which the separation of legislative, executive and judicial functions was thereby made mandatory. When the legislative and executive departments have failed to protect the country and its citizens against such a situation, there is still another constitutional power established to act as a check and safeguard, the judicial department, and the time has now come for the judicial department to exercise its highest function and save the country from the shame, reproach and disgrace with which it is threatened and save from pauperism a large body of our citizens by preserving for them

the rights and resources which their country solemnly promised to place at their disposal.

It is impossible to close one's eyes to the fact that the Act under consideration and many of the flood of congressional enactments which have been sought and obtained from the recent Congress, giving the President extensive arbitrary powers, constitute an utter disregard of the Constitution. A prominent Englishman has publicly congratulated us on getting rid of our Constitution. It has also been said that we ought to do away with the Constitution,— that it is antiquated and altogether unsuited to present conditions. If such ideas are sound, then, of course, our system is all wrong and the sooner we get rid of it and concentrate all the powers and functions of government, legislative, executive and judicial, in a single dictator, the better. However, for nearly a century and a half the country has grown and prospered, and even in times of depression has been in better condition than any other country in the world, under the Constitution so assailed. The very purpose of the Constitution was to give stability to our government and institutions and guard against the destructive effects of hysteria and visionary cure-alls.

The futility of these ill-considered measures and the fact that unjust encroachment upon private rights is only the beginning of a long series of other repetitions was pointed out by James Madison almost a century and a half ago in language so prophetic and appropriate that it almost seems to have been written with present conditions in mind:

> "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to

the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

James Madison, The Federalist, No. 44, p. 351, Jan. 25, 1788.

We of the legal profession, at least,— all of us as members of the bar and some of us as members of the bench,— have taken a solemn oath to uphold the Constitution and, unless that oath was a mere empty and meaningless formula, owe a duty to protect and guard the country from every infringement and attack upon the Constitution until and unless it shall be modified in the manner provided in the Constitution itself.

CONCLUSION.

The instant case affects not only, directly, the rights of the many thousands of war veterans and beneficiaries whose matured insurance claims had not been administratively decided prior to March 20, 1933, but also, indirectly, almost every citizen, in that it involves questions, woven into the fabric of much of the recent federal legislation, of taking private property for public use without just compensation and without due process of law, and of delegation of uncontrolled, unlimited and despotic discretionary powers to the executive to regulate the affairs of nearly everybody. When the legislative and executive departments join in a violation of the constitution, the Supreme Court is the last resort for the upholding of the rights of the citizen and the preservation of the constitution, and we pray that as a means to that end the judgment under review be reversed and the cause be remanded.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioner.

APPENDIX.

Economy Act, March 20, 1933, c. 3, Secs. 1, 2, 3, 4, 5, 17, Title I, 48 Stat. 11, Secs. 701, 702, 703, 704, 705, 717, ch. 12, Tit. 38 Pocket Supp. U.S.C.A.:

SECTION 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension:

(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service.

(b) Any person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, or the World War, and who is permanently disabled as a result of injury or disease; *Provided,* That nothing contained in this title shall deny a pension to a Spanish-American War veteran past the age of sixty-two years entitled to a pension under existing law, but the President may reduce the rate of pension as he may deem proper.

(c) The widow, child, or children, dependent mother or father, of any person who dies as a result of disease or injury incurred or aggravated in line of duty in the active military or naval service.

(d) The widow and/or child of any deceased person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection.

(e) For the purpose of subparagraph (b) of this section, the World War shall be deemed to have ended November 11, 1918.

SECTION 2. The minimum and maximum monthly rate of pension which may be paid for disability or death shall be as follows: For disability, from $6 to $275; for death, from $12 to $75.

SECTION 3. For each class of persons specified in subparagraphs (a) and (b) of section 1 of this title the President is hereby authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability. In fixing rates of pensions for disability or death the President shall prescribe by regulation such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars and/or their dependents and to be paid for

(a) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in war-time service;

(b) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in peace-time service;

(c) Disabilities and deaths not incurred in service.

SECTION 4. The President shall prescribe by regulation (subject to the provisions of section 1 (e) of this title) the date of the beginning and of the termination of the period in each war subsequent to the Civil War, including the Boxer Rebellion and the Philippine Insurrection, service within which shall for the purposes of this Act be deemed war-time service. The President shall further prescribe by regulation the required number of days of war or peace time service for each class of veterans, the

time limit on filing of claims for each class of veterans and their dependents, the nature and extent of proofs and presumptions for such different classes, and any other requirements as to entitlement as he shall deem equitable and just. The President in establishing conditions precedent may prescribe different requirements or conditions for the veterans of different wars and their dependents and may further subdivide the classes of persons as outlined in section 1 of this title and apply different requirements or conditions to such subdivisions.

SECTION 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

SECTION 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * * Provided, that nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this chapter and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance or which may hereafter be rendered in any such suit now pending: * * *

World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U.S.C.A.:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against

the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, * * * *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No State or other statute of limitations shall be applicable to suits filed under this section. * * *

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter.

Executive Order, Veterans Regulation No. 4. * * *

I. The provisions of Title I, Public 2, 73rd Congress, and the Regulations issued pursuant thereto shall not be applicable to any claim wherein compensation or pension is being paid based on a finding heretofore made pursuant to law that the injury or disease causing disability or death was directly connected with active military or naval service, except where under the provisions of Title I, Pub-

lic 2, 73rd Congress and Regulations issued pursuant thereto the rate of disability or requirement as to time of entry into active service has been changed or payment is based on a statutory allowance. The protection afforded by Section 17 is not applicable to any claim wherein the injury or disease causing disability or death has been connected with active military or naval service by virtue of any statutory or regulatory presumption of service connection. * * *

Veterans Regulation No. 8. * * *

III. Payments under contracts of yearly renewable term insurance (including automatic insurance) which have matured, and under which payments have been commenced prior to March 20, 1933, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance (including automatic insurance), or which may hereafter be rendered in any such suit pending in court on March 20, 1933, may hereafter be made.

IV. Further payment of benefits on account of the death of an insured to whom yearly renewable term insurance (including automatic insurance) benefits have been awarded and are being paid in accordance with paragraph III of this regulation shall be made in accordance with the World War Veterans' Act, 1924, as amended, and precedents in effect thereunder.

V. Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed.